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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 169

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Respondent,

v.

COLUMBUS McKINNON CORPORATION,
Respondent-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COLUMBUS McKINNON CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent-Petitioner (hereafter called Respondent) prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, issued in the above-entitled case on March 18, 1966.

Citations to Opinions Below

The opinions herein of the United States Court of Appeals for the Second Circuit are unreported. The opinion granting the motion of Petitioner-Respondent (hereafter called Petitioner) to adjudge Respondent in civil contempt of a decree of said Court (R. 43) is printed as Appendix A hereto. The opinions denying Respondent's petition for rehearing, or in the alternative, for hearing *en banc* dated April 11, 1966 (R. 65, 69) are printed as Appendix B hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC § 1254 (1). The order of the Court of Appeals adjudging Respondent in civil contempt was issued March 18, 1966 (R. 45). Rehearing was denied on April 11, 1966 (R. 67, 71).

Question Presented

Should the Court have resolved, without hearing or trial, necessary issues of veracity and fact raised by conflicting affidavits constituting the only evidence as to the existence or non-existence of the sole fact upon which adjudication of alleged disobedience to the Court's decree could be based?

Statute Involved

The statutory provision involved herein is Title 18 § 401 (3), which reads as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> • • •
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Statement

The National Labor Relations Board, Petitioner, moved the United States Court of Appeals for the Second Circuit for an order adjudging Respondent in civil contempt of a decree of said Court entered on May 4, 1965.

In its moving papers (R. 18, 19), Petitioner alleged that:

> "3. In fact, the Company has relied and does rely on the task rates in measuring the productivity of employees and in awarding or withholding merit wage in-

creases; and, in fact, the Company has in the past relied on the task rates in opposing grievances processed by the Union for the Company's refusal to grant particular merit increases."

This allegation of fact by the Petitioner is supported solely by an affidavit attached to the petition (R. 23, 23a). The Respondent's verified answer to the petition denies the only allegations of fact in the petition upon which contempt could be based and is supported by an affidavit of a representative of Respondent (R. 35-41).

The Court made a determination of this sole question of fact upon said conflicting affidavits, and resolved the issue of veracity raised thereby, without a trial or hearing, and adjudged Respondent in civil contempt of its order dated May 4, 1965.

Reasons for Granting the Writ

Respondent respectfully submits that this issue of fact should be determined from evidence and not from conflicting affidavits.

In *Hart Schaffner & Marx v. Alexander's Department Stores, Inc.* (2nd Cir. 1965), 341 F. 2d 101, the Court stated at page 102 that:

> "A civil contempt order will not issue unless there is 'clear and convincing' proof of violation of a court decree; a bare preponderance of the evidence will not suffice."

National Labor Relations Board v. Rath Packing Co. (8th Cir. 1941), 123 F. 2d 684 concerned an application by the NLRB to have an employer adjudged in contempt. The court held that testimony in regard to disputed facts should be taken before a special master. The opinion in pertinent part said that:

"It is our opinion that issues of fact affecting substantial rights should not be decided upon affidavits, if that can be avoided. Whether the respondent and its officers have disobeyed the decree of this Court; whether, if they have, their disobedience is technical and inadvertent or substantial and deliberate; and what action, remedial or disciplinary, is required to cure such disobedience, if any, are questions which we think should be determined from evidence. The weakness of accepting affidavits as evidence is well understood. It is often impossible to determine whether affiants are speaking from personal knowledge, from hearsay or from belief. The weight which should be accorded their statements cannot be estimated, since little knowledge of an affiant's character or of his prejudices can be gleaned from his affidavit. We think that the Board should be required to prove its charges by competent and material evidence, and that the respondent and its officers should be accorded the right to be confronted by the Board's witnesses and to cross examine them and to adduce evidence to disprove the charges made by the Board" (123 F. 2d p. 685).

In another civil contempt proceeding, *National Labor Relations Board v. Whittier Mills Co.* (5th Cir. 1941), 123 F. 2d 725, at page 727 the court stated:

"This is a proceeding in civil contempt to obtain the benefits of a decree and not one in criminal contempt to hold the respondents guilty of a crime, and the question for decision is not one of the intent with which, but simply whether, certain acts were done. But it goes without saying that in such a proceeding, the burden is on the petitioner to establish the facts necessary to support the order and that *since the matter is submitted on the petition and answer and not on evidence, the facts relied upon must be admitted in the answer and if any fact, material to the finding of contempt, stands unadmitted, the court may not find respondents in contempt*" (Emphasis added).

In *Cohn v. Kramer* (6th Cir. 1943), 136 F. 2d 293, at page 295 the Court stated that:

> "In a civil contempt proceeding for violation of a decree, the respondent is entitled to opportunity to controvert the charges against him; and, when he denies the charges, the burden rests upon the petitioner to prove by evidence that the decree has been violated. If the facts alleged as violation are neither admitted nor proven, the respondent may not be adjudged in contempt. This is elementary law."

Necessary issues of fact and veracity raised by conflicting affidavits in a civil contempt proceeding should, therefore, be resolved by taking proof at a trial or hearing.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. HITCHCOCK,
Counsel for Respondent-Petitioner.

Dated: May 16, 1966.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBUS McKINNON CORPORATION,
Respondent.

Before: Moore, Smith and Hays, U. S. C. JJ.

MOTION TO ADJUDGE RESPONDENT IN CIVIL CONTEMPT OF THIS COURT'S DECREE DATED MAY 4, 1965.

Motion granted.

J. J. S.,
P. R. H.,
U. S. C. JJ.

March 17, 1966.

Although I concur in the granting of Items 1(b) and (c) and 3, I would not grant the balance of the items requested in the prayer for relief.

L. P. M.,
U. S. C. J.

March 17, 1966.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBUS McKINNON CORPORATION,
Respondent.

PETITION FOR REHEARING.

Phillips, Lytle, Yorkey, Letchworth, Hitchcock & Blaine, Buffalo, New York, for respondent.

Petition denied.

J. J. S.,
P. R. H.,
U. S. C. JJ.

April 11, 1966.

Appendix B (Cont'd)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBUS McKINNON CORPORATION,
Respondent.

PETITION FOR REHEARING *IN BANC.*

Phillips, Lytle, Yorkey, Letchworth, Hitchcock & Blaine, Buffalo, New York, for respondent.

No active circuit judge having requested that the motion be reheard *in banc,* the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

11 April, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 169

COLUMBUS MCKINNON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals granting the Board's motion to adjudge petitioner in civil contempt of a decree of the court (Pet. 6) is unreported. The underlying decision and order of the Board (Case No. 3–CA–2283) is unreported, as is the decree of the court of appeals enforcing the Board's order.

JURISDICTION

The order of the court of appeals granting the Board's motion to adjudge petitioner in civil contempt was entered on March 17, 1966 (Pet. 6). The orders denying the petitions for rehearing or for rehearing *en banc* were entered on April 11, 1966 (Pet. 7–8).

221-993—66——1

The petition for a writ of certiorari was filed on May 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the pleadings and supporting exhibits presented no material issue of fact, so that the court of appeals properly adjudged the petitioner in civil contempt of a decree of the court without holding an evidentiary hearing.

STATUTES INVOLVED

The relevant statutory provision empowering the court of appeals to punish disobedience of its decrees is set forth at p. 2 of the petition. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in Appendix C, *infra*, p. 23.

STATEMENT

On December 10, 1964, the Board issued a decision finding petitioner, Columbus McKinnon Corporation, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act for refusing to furnish the Union [1] representing its employees with wage and related information pertinent to the administration and enforcement of the collective bargaining agreement and to the processing of grievances thereunder. Petitioner took no exception to these findings. On May 4, 1965, the court of appeals granted summary enforcement of the Board's order against petitioner

[1] Lodge No. 2108, International Association of Machinists, AFL-CIO.

(Appendix A, *infra*, p. 7, Appendix B, *infra*, p. 16).[2] The court's decree, in relevant part, directed petitioner to furnish the Union, upon request, with (1) a description of petitioner's merit rating procedures and merit rating reports for each employee; (2) a description of petitioner's various incentive pay systems, including the production standards used, the methods employed in arriving at such standards, and the time study report for each job studied; and (3) other information relevant to collective bargaining negotiations, to the processing of grievances under the contract, or to the administration or enforcement of the contract (Appendix A, *infra*, pp. 7–8).

Following entry of the court's decree, the Union asked petitioner to supply it with the time study data used to establish petitioner's "task rates," *i.e.*, time standards for the performance of certain jobs (Appendix A, *infra*, pp. 8–9, 11–12). In a letter requesting this information, the Union recited that the task rates are important to the processing of grievances because they are related to each employee's merit rating and to his eligibility for merit wage increases (*ibid.*).

Petitioner wrote in reply that it would not furnish the time study data underlying its task rates because the "production factor in merit rating * * * is not based on task rates but is based on comparison of performance of other individuals on the job and * * * the task rate is only a convenient reference used in expressing that comparison" (Appendix A, *infra*, p. 12).

[2] The facts set forth herein are derived from the pleadings and exhibits in the contempt proceeding, which are reproduced in Appendices A and B, *infra*, pp. 7–22.

Although petitioner offered to make the task rates themselves available to the Union, it reiterated that the rates "were primarily for production control purposes [and] * * * were not the controlling factor in merit rating employees" (*id.* at 13).

Because of petitioner's refusal to furnish the Union with the time study data on which its task rates were based, the Board moved the court to adjudge petitioner in civil contempt of the court's decree (Appendix A, *infra,* pp. 7–11). The Board attached three exhibits to its motion—the Union's letter requesting the information, petitioner's letter refusing to supply it, and an affidavit of the Union's president alleging that specific employees had been denied merit increases because their work performance "did not substantially exceed the task rates" (Appendix A, *infra,* pp. 11–15).

Petitioner filed an answer to the Board's motion and attached an affidavit of its industrial relations manager repeating the assertions in petitioner's previous letter that each employee is merit rated on how his production compares with that of other employees and not on how his production compares with the task rate (Appendix B, *infra,* pp. 16–22). However, in discussing the grievance of one employee denied a merit increase petitioner again acknowledged, as it had in its letter (Appendix A, *infra,* p. 12), the relevance of the task rate as a reference point in merit increase claims. Specifically, petitioner stated that, in denying the claim for an increase, it had taken the position that the employee had performed at only 102 percent of the relevant task rate, while the employee had con-

tended that he had performed at 122 percent of that rate (Appendix B, *infra*, p. 19).

On the basis of the pleadings and attached exhibits, the court of appeals granted the Board's motion to adjudge petitioner in civil contempt of the court's decree for refusing to supply the time study data requested by the Union (Pet. 6).

ARGUMENT

The court of appeals properly held petitioner in civil contempt for refusing to disclose the time study data underlying its task rates without conducting an evidentiary hearing. The court's earlier decree, entered after petitioner had unlawfully refused to supply pertinent information, required petitioner to disclose to the Union all information relevant to the processing of grievances as well as information relevant to petitioner's incentive pay systems. While the pleadings and exhibits showed that petitioner asserted that employees were not denied or granted merit increases solely on the basis of comparison with the task rates—but that merit increases were determined through a comparison of the actual performances of employees—petitioner did not dispute the Board's allegation that the task rates were nonetheless an element in the petitioner's merit rating system. Petitioner explicitly conceded that the task rate was a "reference used in expressing" the comparison between employees (Appendix A, *infra*, p. 12), and it admitted that in denying a merit increase in at least one instance it referred to the employee's performance as compared with the task rate (Appendix B, *infra*, p. 19).

On the basis of these admissions, the court of appeals correctly concluded that there was no dispute of fact regarding whether the time studies on which the task rates were based were relevant to the Union's prosecution of grievances arising out of claims for merit increases, and were therefore within the court's earlier decree. Even though the task rates might not be controlling in granting or denying increases, they were admittedly the frame of reference which petitioner used in making merit increase decisions. It would therefore be necessary for the Union in processing a grievance to discuss the employee's level of production in terms of the task rate on his job and, in order to do that intelligently, it would be relevant for the Union to know the factors taken into account in establishing that rate as shown by the time study data.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel.

DOMINICK L. MANOLI,
Associate General Counsel.

NORTON J. COME,
Assistant General Counsel.

MARION L. GRIFFIN,
Attorney.

National Labor Relations Board.

JUNE 1966.

APPENDIX A

In the United States Court of Appeals for the Second Circuit

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLUMBUS MCKINNON CORPORATION, RESPONDENT

MOTION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Comes now the National Labor Relations Board (herein called the Board) and respectfully moves this Court for an order adjudging respondent Columbus McKinnon Corporation in civil contempt of this Court for refusing to comply with the decree of this Court entered on May 4, 1965, and for other civil relief.

In support of its petition the Board, upon information and belief, alleges as follows:

I. On May 4, 1965, this Court entered its decree enforcing an order of the Board issued on December 10, 1964, against respondent Columbus McKinnon Corporation, its officers, agents, successors and assigns. In pertinent part said decree, directs that respondent shall:

(a) Upon request, furnish to Lodge No. 2108, International Association of Machinists, AFL–CIO, the following information:

(i) job descriptions for all job titles included within said unit;

(ii) job classification and earnings of each employee;

(iii) description of the operation of the Company's merit rating procedure, copies of the forms used in assigning merit ratings and the merit rating report for each employee;

(iv) description of the various incentive pay systems, including the production standards used and the methods employed in arriving at such standards, and the time study report for each job which had been studied; and

(v) such other information as shall be relevant to the preparation for and conduct of collective bargaining negotiations, to processing grievances arising under the current contract between the Company and the Union and any renewals and extensions thereof or otherwise relevant to the administration or enforcement of the terms of any such contract.

II. Said decree has been in full force and effect since its entry, and at all times material respondent, its officers and agents have had notice and actual knowledge of its terms.

III. Respondent Columbus McKinnon Corporation has refused to comply with said decree of this Court by refusing to furnish Lodge No. 2108, International Association of Machinists, AFL–CIO, (herein called the Union) certain relevant information needed by the Union to administer effectively the collective bargaining contract it has with respondent. More particularly, the Board shows the Court as follows:

1. On July 19, 1965, the Union sent a letter (Exhibit A, attached hereto) requesting the Company to furnish it with certain time study data used by the

Company in measuring the productivity of certain employees. This information was used by the Company to establish what it called task rates or time standards for the performance of certain jobs. The Union's letter noted that this information was relevant "as each person in the bargaining unit is affected by it in relation to his merit rating, which is part of his rate of pay and wages."

2. By letter dated July 20, 1965, (Exhibit B, attached hereto) the respondent refused to furnish the Union the time study data upon which the task rates were based but reiterated its previous offer to make the task rates themselves available. The Company took the position that it was not obligated to furnish the time study data upon which the task rates were based asserting that its "production factor in merit rating on day work jobs is not based on task rates but is based on comparison of performance of other individuals on the job and that the task rate is only a convenient reference used in expressing that comparison."

3. In fact, the Company has relied and does rely on the task rates in measuring the productivity of employees and in awarding or withholding merit wage increases; and, in fact, the Company has in the past relied on the task rates in opposing grievances processed by the Union for the Company's refusal to grant particular merit increases. (See affidavit of Union President Robert Brady, Exhibit C, attached hereto.)

IV. By this conduct as described above, respondent has refused to comply and continues to refuse to comply with the decree of this Court. Therefore, respondent has been, is, and continues to be in civil contempt of this Court.

Wherefore, the Board respectfully prays:

1. That the Court issue an order adjudging respondent in civil contempt of the Court and requiring respondent to purge itself of such contempt by:

(a) Posting immediately in conspicuous places at the Company's premises in Tonawanda, New York, appropriate notices stating that respondent has been adjudged in contempt of this Court for refusing to comply with this Court's decree.

(b) Forthwith furnish to the Union the time study data upon which the task rates are based and any other relevant information as set forth in the decree, and otherwise complying with the terms of the decree.

(c) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Third Region of the Board, within 10 days after the entry of the order of adjudication, showing what steps have been taken by respondent to comply with the Court's direction, and filing such periodic sworn statements as the Court may, by further order, require.

(d) Paying to the Board all costs and expenses, including counsel fees, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding.

2. That in order to assure compliance with the aforesaid directions of the Court, the respondent be assessed a sum to be fixed by the Court for each and every day that respondent fails and continues to refuse to carry out the mandate of this Court.

3. That upon a failure of respondent to so purge itself of civil contempt, the Court issue attachments against the Company, its officers and agents.

4. That the Court take such other and further action and grant such other and further relief as may be just, reasonable and necessary to make effective its de-

cree and as this proceeding in civil contempt may require.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D.C., this 10th day of November 1965.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
PAUL ELKIND,
PAUL M. THOMPSON,
Attorneys, National Labor Relations Board,
Washington, D.C., 20570.

EXHIBIT A

JULY 19, 1965.

COLUMBUS MCKINNON CHAIN CORPORATION
Fremont Avenue
Tonawanda, New York

Att: Mr. Sherman Richards
Industrial Relations Manager

DEAR SIR: The International Association of Machinists' Local Lodge #2108 has repeatedly asked the Columbus McKinnon Corporation for time study data relevant to the task rate in the plants which we represent.

It is imperative that the Union, as sole representative for the employees of the Columbus McKinnon Corp., in its plant, which Local Lodge #2108 represents, has this information on time study of task rates,

the tasks rates, the source of the task rates and any change of same, in order to bargain intelligently and to represent our members on rates of pay, hours, wages and conditions of employment.

We have continuously expressed our desire to receive this information as each person in the bargaining unit is affected by it in relation to his merit rating, which is a part of his rate of pay and wages.

We ask you to forthwith indicate that you will supply this information to us. We will expedite your reply immediately, as many people are aggrieved by your contumacious refusal to furnish this information to us.

Please reply to this request by Thursday, July 22, 1965.

Very truly yours,

ROBERT E. BRADY,
President, LL #2108, I.A.M.

EXHIBIT B

JULY 20, 1965.

Mr: ROBERT E. BRADY
President, Lodge #2108
International Association of Machinists, AFL–CIO
36 Delaware Street
Tonawanda, New York

DEAR SIR: In reference to your letter of July 19, 1965, we have demonstrated to you, in several third step meetings concerning merit ratings, that our production factor in merit rating on day work jobs is not based on task rates but is based on comparison of performance of other individuals on the job and that the task rate is only a convenient reference used in expressing that comparison. All the employees on a job could be below the task rate and yet some could be merit rated as "substantially exceeding expected

performance." All the employees on a job could be over a task rate and yet some could be merit rated very low on the work performance factor because they are producing well below what others are producing.

Though we said to you at the time that tasks were primarily for production control purposes, that they were not the controlling factor in merit rating employees, and that we could see no reason for your needing them, we offered on November 23, 1964 to make task rates available to you. That has been and is a continuing offer.

Very truly yours,

COLUMBUS MCKINNON CORPORATION,
SHERMAN L. RICHARDS
Manager, Industrial Relations.

cc: HYMAN DISHNER,
Compliance Officer, NLRB.
F. V. COLE
D. B. MYERS

EXHIBIT C

CITY OF TONAWANDA,
County of Erie,
State of New York, s.s.:

I, Robert Brady, being duly sworn, depose and voluntarily state:

I am president of Lodge No. 2108, International Association of Machinists and Aerospace Workers, AFL-CIO. Our present contract with Columbus-McKinnon Corporation expires July 15, 1966. As president of the local union I became involved as a representative of the union in the second and third steps of a grievance. Fourth step concerns mediation which I am also involved in.

I have direct knowledge of several grievances filed in behalf of employee Leonard Sommers, a tester

hand hoist at the Buffalo plant who was denied a merit increase because he failed, according to the employer, to exceed substantially the task rates on the different jobs performed. At least three grievances have been filed since about the first of January 1965 concerning the employer's denial of a merit increase. Aggrieved employee claimed he performed at 122 per cent but the employer maintained he only performed at 102 per cent of the task rates and consequently he was denied a merit increase because his work performance did not substantially exceed the task rates.

On or about October 11, 1965, Donald Wolf an employee of the Tonawanda, N.Y. plant, Department C–3 was denied a merit increase at the third step of the grievance procedure on the ground that Wolf did not exceed substantially the task rates. The employer's answer at the third step was that it agreed that there was some difficulty with the functioning of the aggrieved employee's machine, but there was ample opportunity for the employee to maintain an adequate production level and improve in other areas of performance.

In the latter part of August 1965, a grievance was filed in behalf of David Bugbee an employee at Tonawanda, Dept. C–3 because of the employer's denial of a merit increase. The employer claimed that the employee did not exceed substantially the task rates of the job. The third step in the grievance procedure has not as yet been completed.

On January 8, 1965, a grievance was filed for employer's refusal to grant merit increase to Dennis Dahl in Department C–3. The employer's answer at the third step was that rating was fair and proper and that further improvement would be reflected in subsequent ratings. It took three months to obtain third step reply.

On or about June 15, 1965, I together with Richard Meyers, chief steward met with Sherman Richards and William Ronan, Industrial Relations Manager and personnel manager respectively at the Company's office. This occurred shortly after a strike had been settled and I wanted to try and resolve any issue that there might still exist with regard to compliance with National Labor Relations Board case No. 3–CA–2283. I asked Richards to furnish the union with time study data and other material relating to the task rates on day work jobs so that the union could be in a position to handle grievances on merit increases. Richards stated that the employer would not furnish the union with the information, they were not required to do so and it was not necessary for us to have it.

Merit increases are granted every 3 months for most employees. For those employees who are on the same job for 5 years or more are merit rated once a year. All employees are merit rated on November 1 each year. Experience has disclosed that on the occasion of each merit rating time there have been from 5 to 10 grievances with reference to the denial by the employer of a proper merit rating. A majority of these cases indicate that the merit increase is being denied because the employee has failed to substantially exceed expected performance on the job. This category of work performance is weighed heavily in terms of whether an employee will receive the top merit increase which is 10 percent.

I have read the foregoing statement consisting of four handwritten pages and swear it is the truth to the best of my knowledge and belief.

(S) ROBERT BRADY.

Subscribed and sworn to before me this 28th day of October 1965.

(S) HYMEN DISHNER,
Compliance Officer.

APPENDIX B

In the United States Court of Appeals for the Second Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLUMBUS MCKINNON CORPORATION, RESPONDENT

VERIFIED ANSWER

The Respondent, Columbus McKinnon Corporation, by its attorneys, Phillips, Lytle, Yorkey, Letchworth, Hitchcock & Blaine, for its answer to the petition herein:

First: Admits the allegations contained in paragraphs numbered I and II thereof.

Second: Denies each and every allegation contained in paragraphs numbered III and IV thereof.

Wherefore, Respondent respectfully prays:

That the Court issue an order dismissing the petition herein, together with the costs and disbursements of the motion upon said petition.

Dated: Buffalo, New York, November 30, 1965.

COLUMBUS MCKINNON CORPORATION,
By DON B. MYERS.
PHILLIPS, LYTLE, YORKEY,
LETCHWORTH, HITCHCOCK & BLAINE,
By FRANCIS V. COLE,
A Member of the Firm.

In the United States Court of Appeals for the Second Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLUMBUS MCKINNON CORPORATION, RESPONDENT

AFFIDAVIT

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss.:

Sherman L. Richards, being duly sworn, deposes and says:

I am Industrial Relations Manager of Columbus McKinnon Corporation, respondent in the above proceeding, and make this affidavit in opposition to the motion of the petitioner, National Labor Relations Board, for an order adjudging respondent, Columbus McKinnon Corporation, in civil contempt of this Court for refusing to comply with the decree of this Court entered on May 4, 1965.

I am in charge of personnel and industrial relations matters of the respondent corporation including the steps taken by the corporation for the purpose of maintaining compliance with the provisions of the said decree. It is the intent and purpose of the respondent corporation to comply fully with all applicable provisions of the National Labor Relations Act and in particular with all the terms and provisions of the said decree.

In the bargaining unit represented by the union mentioned in the petition herein some of respondent's employees are included in an incentive wage system. Under this system, wages are based upon performance according to time studied standards. No question or dispute exists concerning compliance

by respondent with the provisions of the decree with regard to data and information which is or becomes applicable to the incentive wage system, including time study information. The only information and data in question in this proceeding is information and data, other than that which is covered by the wage incentive system, and which is not used by respondent as a basis for its determination of wage rates or merit ratings.

The petition herein is predicated solely upon respondent's refusal to furnish certain data and information described in Exhibit A attached to the petition as "Time study data relevant to the task rate."

For purposes of its production control and cost-estimating, respondent makes estimates, called "task rates" which are assigned to some elements of its jobs.

The facts and circumstances with regard to the union's request for the said data and information are as follows:

The "task rates" in question, whether or not covered by the terms and provisions of the Court's decree, have been, upon request of the union, made available to it.

In making its request for the data and information involved, the union stated, "We have continuously expressed our desire to receive this information as each person in the bargaining unit is affected by it in relation to his merit rating, which is a part of his rate of pay and wages." (Exhibit A.)

The task rates in question, and consequently, information on which the task rates are based, including time study on some but not all job elements, are not used or applied by the respondent as a basis for its determination of merit ratings of employees.

The three grievances of employee Leonard Sommers mentioned in the affidavit of Robert Brady (Exhibit C) with regard to his merit rating, were decided and determined by the company because his total performance on his job did not compare favorably with total performance on simlar work of other individuals on the job and not because his performance did not substantially exceed task rates on any of the elements of his job.

The time study data and information which the company has is not only limited in its possible applications to portions, and not all of the work in question, but it is not used or relied upon by the respondent for the purpose of determining merit rating of any individual employee, because it is not precise, sufficient or accurate. Much of it consists of estimates based on estimates. Respondent did not use or rely upon any such data in relation to the said grievances of Leonard Sommers and this was expressly and repeatedly stated by respondent to the union representatives throughout the discussions of the grievance. On the job in question the employee has control of his own timekeeping which is not audited. Whether or not there was any practicable basis for either the employee's claim of performance at 122% or the company's estimates of 102% of any task rates, the respondent's disposition of the grievances was not made in reliance upon performance in relation to task rates.

The grievance of Donald Wolf, mentioned in the affidavit of Robert Brady (Exhibit C) with regard to denial of a merit increase was *not* decided by respondent, "on the ground that Wolf did not substantially exceed the task rates," as asserted in Exhibit C. It was denied on the ground that Wolf's per-

formance on his job did not compare favorably with performance of other individuals on the job. Respondent stated in its answer at the third step, it agreed that "there was some difficulty with the functioning of the aggrieved employee's machine, but there was ample opportunity for the employee to maintain an adequate production level and improve in other areas of performance." Even if applicable task rates on elements of Wolf's job had been considered in his merit rating their applicability would have been destroyed by the malfunctioning of the machine. Since no sufficient, accurate or reliable task rate data on the work in question was available, any production data respondent had was not based on time study and under the circumstances asserted in Exhibit C could not be used.

The grievance of David Bugbee, mentioned in the affidavit of Robert Brady (Exhibit C) does not involve any question or dispute concerning respondent's use or reliance in merit rating upon task rates for any of the elements of the work in question. Respondent did not deny Bugbee a merit increase because he did not exceed substantially any task rates of any elements of the job, and emphatically so stated in the handling of his grievance. Respondent compared his job performance with the performances of other individuals on similar jobs. On the basis of Bugbee's own, unaudited records of his total job performance, on similar work, the performance of employee Wolf, mentioned above, was better than his. Subsequent to discussion of the Bugbee grievance in the second step of the applicable contract grievance procedure, the union has made no request for further processing of the grievance.

Dennis Dahl, whose grievance is mentioned in the affidavit of Robert Brady (Exhibit C), complained that he had improperly been denied a merit increase. Respondent maintained that its denial of an increase was based on comparison of his performance on his job with the performances of other individual employees on similar work.

Respondent did not deny a merit increase because of any comparison based upon data and information involving time studies, in relation to task rates or otherwise. Dahl's job required operation of a particular kind of machine, sometimes operated singly and sometimes operated with two or more machines, in multiple. No time study data or other information, data or material relating to task rates was used or relied upon by respondent in connection with this grievance or the respondent's determination on merit rating upon which the grievance was based.

Respondent does not use or rely upon time study data or employee performance in relation to or in comparison with "task rates" in merit rating of employees. Respondent does not develop such data, studies or information for such use. It is the company's policy not to use any data, studies or information of this nature, which it has developed, for purposes of its production control and cost-estimating, as a basis for determination of the merit ratings of employees. Respondent has told employees and the union that it does not use or rely upon any such data or information for purposes of merit ratings. On the basis of the present state of data, studies and information in its possession the company does not plan or intend to use, apply or rely upon data and information which it has in any manner or to any

extent which would be determinative of the qualifications of any employee for merit rating.

SHERMAN L. RICHARDS.

Subscribed and sworn to before me this 30th day of November, 1965.

JOHN F. DONOVAN.

John F. Donovan, Notary Public, State of New York, Qualified in the County. My Commission expires March 30, 1966.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

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IN THE

Supreme Court of the United States

October Term, 1966

No. 169

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Respondent,

v.

COLUMBUS McKINNON CORPORATION,
Respondent-Petitioner.

REPLY BRIEF FOR COLUMBUS McKINNON CORPORATION

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Statement

This reply brief is submitted to direct attention to misstatements of fact contained in the brief for the National Labor Relations Board:

The petition herein for adjudication in civil contempt is based on allegations of reliance by the Company upon certain information called "task rates." The Company's answer denies these allegations under oath.

On pages 4 and 5 of its brief the Board states:

> "However, in discussing the grievance of one employee denied a merit increase petitioner *again acknowledged,* as it had in its letter (Appendix A, *infra,* p. 12), the relevance of the task rate as a reference point in merit increase claims. Specifically, petitioner

> stated that, in denying the claim for an increase, it had taken the position that the employee had performed at only 102 percent of the relevant task rate, while the employee had contended that he had performed at 122 percent of that rate (Appendix B, *infra,* p. 19)."

and

> "* * * petitioner *did not dispute* the Board's allegation that the task rates were nonetheless an element in the petitioner's merit rating system. Petitioner *explicitly conceded* that the task rate was a 'reference used in expressing' the comparison between employees (Appendix A, *infra,* p. 12), and it *admitted* that in denying a merit increase in at least one instance it referred to the employee's performance as compared with the task rate (Appendix B, *infra,* p. 19)." (Emphasis added.)

Petitioner did not "again acknowledge," fail to "dispute," "explicitly concede" or "admit" reliance on task rates to measure any employee's performance, nor did it "admit" reliance on them in opposing any grievance.

The Board attempts to spell out an admission of reliance upon the data in question by citing, out of context, portions of the Company's supporting affidavit, in the same place where that affidavit states emphatically: "* * * respondent's disposition of the grievance *was not* made in reliance upon performance in relation to task rates." (Emphasis added.)

The issue of fact, as to whether or not the Company's time study data underlying some of its task rates were relied on by the Company in measuring the productivity of employees, in awarding or withholding merit wage increases, or in opposing grievances, was decided without a trial or hearing.

The Board neither claims nor argues that a trial or hearing should be refused in a contempt proceeding when

an issue of fact exists. The Board's brief is misleading in that it argues that a trial or hearing was unnecessary because of respondent-petitioner's "admissions." The "facts" alleged and relied on by the Board have been denied under oath, not admitted. An issue of fact exists. A trial or hearing should have been directed.

Respectfully submitted,

ROBERT M. HITCHCOCK,
Counsel for Respondent-Petitioner.

Dated: August 15, 1966.